Supreme Court, U.S.
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No. 80-258

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe and All Villages, Clans, and Individual Members of the Hopi Tribe,

Petitioner,

v.

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on Behalf of the Navajo Indian Tribe and All Villages, Clans, and Individual Members of the Navajo Tribe,

Respondent.

BRIEF OF THE NAVAJO TRIBE IN OPPOSITION TO THE HOPI TRIBE'S PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

The Hopi Tribe's statement of the question presented is not responsive to the requirements of Rule 17 of the Rules of this Court relating to standards governing the granting of Writs of Certiorari. Accordingly, it is submitted that the question must be restated as follows:

> Whether the Court of Appeals' rejection of the Hopi Tribe's claim to an undivided one-half interest in the Navajo Indian Reservation presents a question which is appropriate for review on Writ of Certiorari, where the Hopi claim is premised solely on a statute that has no broader application than to the litigants in this case and where there is no colorable conflict with any decision of this Court.

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COUNTERSTATEMENT OF THE CASE

In this litigation, the Hopi Tribe is asserting a claim to an undivided one-half interest in land that is now and for many decades has been named, administered and used as the "Navajo Indian Reservation." The Hopi claim encompasses land that provides homes and livelihoods for tens of thousands of Navajo Indians and has never,

in recorded history, been used, occupied or possessed by Hopi Indians.

Despite the Hopi Tribe's assertion that this is a "century-old dispute" (Pet., at *i*)[1] the Hopi claim is built entirely upon the language of a 1934 statute. In particular, the Hopi Tribe relies upon the second sentence of the first section of the Navajo Boundary Act,[2] which provides:

> All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. (App. B, at A-57.)

As the sole foundation for its claim, the Hopi Tribe alleges that in 1934, some Hopi Indians lived at the small village of Moencopi situated just inside the boundary of the Navajo Reservation. On that basis, the Hopi Tribe claims to qualify as the sole "other Indians" described in the above-quoted sentence and argues that the Hopi

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[1] The Hopi Tribe's Petition for a Writ of Certiorari is herein cited as "Pet." Citations to "App." refer to the appendices attached to the Hopi petition.

[2] The Act of June 14, 1934, 48 Stat. 960, entitled "An Act to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes," is herein sometimes referred to as "the Navajo Boundary Act" or "the 1934 Act."

Tribe is entitled to one half of the Navajo Reservation pursuant to the "plain meaning" of the quoted sentence and the intent of Congress.[3]

Because the Hopi Tribe's claim is based entirely upon the second sentence of the Navajo Boundary Act, the central legal question in this litigation is the interpretation of the meaning and effect of that sentence. The only facts which are relevant to that question are those which comprise the legislative history of the Act, including the history of the treaty, legislation and Executive Orders which preceded the 1934 Act and therefore underlie and illuminate the phrase "unreserved and unappropriated public lands" as used in the Act.

The Navajo Reservation was established by treaty in 1868, and thereafter grew through a series of Acts of Congress and Presidential Executive Orders to accommodate a growing Navajo population.[4] The Navajo Boundary Act was the culmination of one such effort to enlarge the Navajo Tribe's holdings by eliminating "checkerboard" railroad lands from the Reservation. Toward that end, the preamble and first sentence of the 1934 Act drew a boundary around the Navajo Reservation, in the following terms:

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[3]The Hopi Tribe's assertion that its claim is based upon the "plain meaning" and the clear "intent" of the 1934 Act is certainly undermined, if not utterly destroyed, by the fact that the Hopi Tribe did not voice its claim for thirty years, until the mid-1960's.

[4]The Navajo Reservation was enlarged or ratified by Executive Orders in 1878, 1880, 1884, 1900, 1901, 1907, 1908, 1913, 1917 and 1918 and by Acts of Congress in 1902, 1930, 1931 and 1934.

AN ACT

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [metes-and-bounds description of the exterior boundary omitted]. (App. B, at A-55).

Most of the lands within the boundary described in the 1934 Act had been previously set aside by treaty, legislation and Executive Orders and, in effect, the Act merely confirmed or ratified the reservation status of those lands. However, the 1934 boundary also circumscribed some parcels that were not previously a part of the Navajo Reservation, thus adding those lands to the Reservation. By the express terms of the 1934 Act, only lands which were "unreserved and unappropriated public lands" as of 1934 were affected by the reference in the second sentence to "other Indians as may already be located thereon." Accordingly, any "other Indians" who were "located" on the Navajo Reservation in 1934 have an interest in the lands they were occupying only if the occupied lands were "unreserved and unappropriated."

Upon cross-motions for summary judgment, the District Court reviewed in detail the voluminous legislative history of the Navajo Boundary Act and soundly rejected the Hopi Tribe's claim that "[t]he 1934 Congress simply decided to grant an equal and undivided interest [in the Navajo Reservation] to both the Navajo and Hopi

Indians . . . ." (Pet., at 13.) The District Court set forth a careful analysis of the congressional history of the 1934 Act and concluded as follows:

> The only meaning this ["other Indians"] clause could plausibly be given in light of the legislative history is to protect the rights and interests of the Hopi tribe to the land they were occupying and using outside the 1882 Reservation on June 14, 1934. (App. A, at A-45-46.)

Thus, the District Court rejected the Hopi Tribe's claim to "an undivided one-half interest in most of the reservation." (App. A, at A-40.)

The Court of Appeals affirmed the District Court's ruling in that regard, stating as follows:

> The Hopis' argument that the "plain meaning" of the 1934 Act vests equal title in both tribes is tenuous at best. . . . Legislative history makes it plain that "located thereon" cannot be read to convey to the Hopis a one-half interest in the Reservation. The district court's holding was based on a fair reading of the 1934 Act's legislative history. (App. A, at A-10-11.)

The Hopi petition asserts that the District Court and the Court of Appeals were "manifestly wrong" in their rejection of the Hopi reading of the legislative history and the Hopi interpretation of the "plain meaning" of the 1934 Act. (Pet., at 12.)

REASONS FOR DENYING THE WRIT

On its face, the Hopi claim embraces a vast geographical area and seeks to dispossess a large number of Navajo Indians from their homelands. But those factors alone

do not provide grounds for review by this Court of the question presented in the Hopi Tribe's petition.

The Hopi petition argues merely that the Court of Appeals was wrong in its interpretation of a statute which has no effect on parties other than the litigants in this case. As demonstrated below, the Court of Appeals was not wrong, but even if it were, the Hopi Tribe has not shown any "special and important reason" for its question to be reviewed, as required by Rule 17 of the Rules of this Court.

Indeed, the Hopi Tribe's only attempt to come within the standards of Rule 17 is an assertion that the decision of the Court of Appeals was "not consistent with the decision in *Healing v. Jones* as affirmed by this Court." (Pet., at 17.) However, as shown below, there in nothing in the *Healing v. Jones*[5] decision which supports the Hopi claim and all attempts by the Hopi Tribe to stretch and distort the *Healing* decision to create the illusion of an inconsistency are to no avail.

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[5] 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

A. Because the Hopi Tribe's claim of a joint, equal and undivided interest in the Navajo Reservation is not supported by the express language or legislative history of the 1934 Act, the District Court and the Court of Appeals properly rejected the claim, and the Hopi Tribe's dispute with those decisions is not deserving of this Court's review.

With respect to the "plain meaning" of the Navajo Boundary Act, clearly the Act defines a *Navajo* Reservation for the benefit of *Navajo* Indians. In that regard, the Court of Appeals found as follows:

> The 1934 Act is concerned primarily with Navajo affairs. The boundaries described are of "The Navajo Indian Reservation". . . .
>
> The Hopis' argument that the "plain meaning" of the 1934 Act vests equal title in both Tribes is tenuous at best. (App. A, at A-10.)

The Hopi petition urges that the courts should not look to the "plain meaning" of the entire Act, but instead should lift the words "located thereon" out of the statute and give those words the "meaning" which might possibly be ascribed to them in other contexts. Of course, such an approach is impermissible under the cardinal principle of statutory construction, that the courts must "ascertain the congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975), which quotes with approval from *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850):

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look

> to the provisions of the whole law, and to its object and policy.

Moreover, contrary to the Hopi Tribe's assertion and citations (Pet., at 15), there is not an "accepted judicial construction" to the effect that the words "located thereon" are necessarily "words of purchase" whenever appearing in "Indian legislation," and the authorities cited for that proposition simply have no bearing on the present controversy.[6]

The Hopi reference to "rules of construction" applicable to real estate conveyances is simply irrelevant. The Navajo Boundary Act is an Act of Congress and it must be interpreted in accordance with ordinary canons of statutory construction. Moreover, even if the "rules" applicable to interpretation of deeds and mortgages were also applicable to statutes, it is axiomatic that no presumption or "rule" in aid of construction can override or alter the intent of Congress. *E.g.*, *United States v. Alpers*, 338 U.S. 680, 681-682 (1950).

With respect to the intent of Congress, the Court of Appeals held that the "[l]egislative history makes it plain that 'located thereon' cannot be read to convey to the Hopis a one-half interest in the Reservation." (App. A, at A-10-11.) Significantly, neither the District Court nor the Court of Appeals found, nor has the Hopi Tribe

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[6]The phrase "located thereon" is used in the General Allotment Act of February 8, 1887, 24 Stat. 388, but nowhere in that statute is it stated that the words are "words of purchase." Similarly, the decision in *Fairbanks v. United States*, 223 U.S. 215 (1912), did not mention "words of purchase", but merely held that a statutory reference to "each Indian located [on a certain reservation]" applied not only to Indians living at the time the statute was enacted but also to those born thereafter.

ever cited, a single word in the legislative history of the 1934 Act suggesting that any Senator, Congressman, government agent, Hopi Indian[7] or other person intended or understood or expected that the 1934 Act would convey to the Hopi Tribe an undivided one-half interest in the Navajo Reservation. Rather, it is abundantly clear from the legislative history that the intent of the Congress was to enlarge the Navajo Reservation.[8] Thus, it would be *contrary* to the express legislative intent if the "other Indians" provision were read in such a way as to *diminish*, rather than enlarge, the Navajo Tribe's lands.

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[7]To the contrary, the Bureau of Indian Affairs conducted at least five meetings at Hopi villages at which the proposed legislation was explained to the Hopi Indians. *A Proposed Bill to Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs*, 72d Cong., 2d Sess. (1932), at 29. At those meetings, the government representatives consistently explained that to the extent the legislation affected the Hopis at all, it was merely intended to "protect the rights of the Hopi Indians to the lands they occupy around here" (*id.*, at 34 and 39) and "to protect especially the rights of the Hopi Indians to what is called their reservation" (*id.*, at 54) and "to protect their [Hopi] rights to the lands they are now using and occupying" (*id.*, at 68). No suggestion was ever made that the Hopis would receive a one-half interest in the Reservation. The Indian Bureau's explanation of the bill was presented to the Senate and was made a part of the legislative record prior to passage of the 1934 Act. (App. A, at A-44.)

[8]For example, on June 14, 1932, the Indian Commissioner wrote that "[o]bviously the Navajos will need all these lands for years to come." (Ex. N-90; Ex. H-134.)

B. The Hopi claim to an undivided one-half interest in the Navajo Reservation is not supported by *Healing v. Jones*.

In *Healing v. Jones*, the District Court adjudicated and this Court affirmed the respective rights and interests of the Navajo and Hopi Tribes in a reservation set aside pursuant to the Executive Order of December 16, 1882, which withdrew lands "for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon." The *Healing* case held that the Hopis, as the Tribe expressly named in the reservation grant, had an exclusive interest in all land occupied by Hopis and a half interest in the lands upon which Navajo Indians had been exlusively settled by the Secretary of the Interior. In *Healing*, the Navajo Tribe did not assert, nor did the courts consider, any claim of interest in lands not occupied by Navajos. Thus, the issues and the holding in *Healing v. Jones* offer no support whatsoever for the Hopi Tribe's present effort to obtain a one-half interest in lands which Hopi Indians did not use or occupy at any material time.[9]

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[9]The *Healing* decision consists, essentially, of two distinct parts. First, the court held that the area used or occupied by the tribe named in the reservation grant belonged exclusively to said named tribe. Second, the court further held that the area used or occupied by the tribe *not* named in the reservation grant belonged in equal shares to the named and unnamed tribes. In this petition the Hopi Tribe asks this Court to review that portion of the holding of the Court of Appeals that deals with the land used or occupied by the named tribe, an issue which the Court of Appeals decided *in conformity* with the first aforementioned holding in *Healing*. By contrast, the Navajo Tribe's petition, No. 80-265, asks for review of the Court of Appeals' holding as to the relative rights of the tribes in lands occupied by the unnamed tribe, which is in conflict with the second of the aforementioned holdings in the *Healing* case.

The Hopi Tribe argues that a dictum in the *Healing v. Jones* decision supports its claim:

> The court [in *Healing v. Jones*] stated that a "such other Indians" clause would have granted such immediate and coextensive rights *if* it had used language such as "and other Indians *now settled* there." (Pet., at 18; emphasis added in Hopi petition.)

However, the *Healing v. Jones* decision contains nothing even remotely resembling such a statement.[10]

Thus, the Hopi Tribe's argument based on *Healing v. Jones* is without merit. When that argument is rejected as having no support at all, the Hopi petition is left without a single colorable issue within the standards set forth in Rule 17.

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[10]In fact, the dictum cited in the Hopi petition merely notes that "immediate reservation rights" were conveyed by a grant of lands to "Papago *and other Indians now settled there.*" 210 F. Supp. at 140 (emphasis in original). The *Healing* decision does *not* state that the rights of the "other Indians" in that situation were "coextensive" with those of the Papago Indians in any circumstance, and certainly does *not* state whether the "other Indians did or did not have any right in lands which they did not occupy. In the present case, there is no dispute that if any "other Indians" obtained rights under the 1934 Act, their rights were "immediate." The sole issue presented by the Hopi petition is whether such rights were "coextensive" with those of the Navajos, and on that point *Healing v. Jones* is inapposite.

C. The Hopi Tribe's anticipated difficulties of proof are irrelevant, but in any event they are merely the result of the nature of the Hopi claim.

Having embarked upon a legal assault seeking to take one half of the Navajo Reservation away from the Navajo people, the Hopi Tribe is now disgruntled that its claims will be difficult to prove. Surely such difficulties are neither unprecedented nor insurmountable. But more significantly, it is a bizarre notion indeed that any court should tailor the substantive rule of law in order to ease the burden of proof of one of the litigants.

The lower courts' rejection of the Hopi claim is not "discriminatory" against the Hopis (Pet., at 10) or a failure to deal "fairly" with the Hopis (Pet., at 21). Rather, it is the only result which could plausibly be reached in light of the language and history of the Navajo Boundary Act.

It is quite true that during the legislative efforts leading to the 1934 Act, the Hopi Tribe thwarted every effort to legislate a boundary which would limit the area of exclusive Hopi use (principally concerned with the 1882 Executive Order area). However, the Act of December 22, 1974, 25 U.S.C. § 640d (App. B, at A-62) has authorized the drawing of such a line and the Hopi Tribe's commencement of this litigation has invited such a boundary and made it necessary and inevitable. Accordingly, the Hopi's objections voiced in the 1930's are immaterial.

CONCLUSION

For the foregoing reasons, Respondent Peter MacDonald for and on behalf of the Navajo Tribe of Indians, respectfully prays that the Hopi Petition for a Writ of Certiorari should be denied as to the questions presented therein.

Respectfully submitted,

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